

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

NEW ENGLAND CENTRAL
RAILROAD, INC.,

Plaintiff,

-v.-

Civil Action No. 04-30235-MAP

SPRINGFIELD TERMINAL
RAILWAY COMPANY, et al.,

Defendants.

**DECLARATION OF ERIC L. HIRSCHHORN
IN SUPPORT OF DEFENDANTS' SECOND MOTION
TO COMPEL DISCOVERY**

Eric L. Hirschhorn declares as follows:

1. I am counsel to the defendants in this action, Springfield Terminal Railway Company and Boston and Maine Corporation. I make this declaration in support of the defendant's second motion to compel the plaintiff, New England Central Railroad, Inc. ("NECR") to respond to the defendants' interrogatories and requests for production of documents.

2. The defendants made their first motion to compel on September 18, 2006 [Docket Nos. 39-40] because NECR was late in responding to the defendants' interrogatories and requests for production of documents, and had not provided a privilege log. NECR responded to that motion by providing only a single document—the General Code of Operating Rules that is

used by NECR and a number of other railroads. NECR's interrogatory responses also were incomplete in a number of respects.

3. On October 16, 2006, counsel for NECR (Richard A. Davidson, Jr., Esq.) and I discussed the shortcomings of NECR's responses. At Mr. Davidson's request, I sent him a letter the following day detailing the principal documents and interrogatory responses that the defendants had expected to receive but that NECR had not provided (Exh. A hereto).

Specifically, the missing items are:

- Weekly and semiweekly track inspection reports covering the Line, from January 1, 2002 to the present time. These are different from the monthly track reports that were produced as part of NECR's initial disclosures under Rule 26(a)(1).
- All documents relating to the derailment that is the subject of the action, including all versions (draft and final) of any reports furnished to the Federal Railroad Administration in respect of the derailment, internal memoranda (handwritten and otherwise), and the like.
- All documents relating to or addressing the Federal Railroad Administration track inspection conducted on the Line in June 2005, including any plans for responding to or addressing the results of that inspection.
- All documents relating to actual or possible disciplinary action affecting individuals responsible for the condition of the track on the Line between January 1, 2002 and the present time.
- All recordings (including written transcripts and summaries thereof) of conversations between the ST/B&M crew of the train that derailed and the individuals responsible for dispatching the Line on behalf of NECR.
- The agreements between NECR and Amtrak.
- All correspondence between NECR (or its agents) and Amtrak since January 1, 2002 regarding track conditions and slow orders on the Line, as well as incentive payments.
- Copies of any slow orders governing the Line between April 1, 2005 and July 4, 2005.
- All correspondence between NECR and its agents, on the one hand, and the contractors who performed repair work on the Line due to the derailment, on the other, relating to such repair work. We received considerable documentation of invoices and similar formal commercial items relating to this work as part of

NECR's initial disclosure but not the interchanges about the actual work to be performed.

4. In addition to the absence of the anticipated documents, NECR's responses to the defendants' Interrogatories #10 and #15 contained various objections but no substantive information (Exh. A hereto). To the extent that NECR's objections were based upon the text of Section 7.1 of the Interstate Commerce Commission's 1990 trackage rights order, my letter reminded Mr. Davidson that the Surface Transportation Board's reconsideration decision, served January 10, 2006, interpreted that provision to be inapplicable if there has been gross negligence or willful misconduct on the part of NECR. No review of the STB ruling was sought, *see* 28 U.S.C. § 1336 (2000), and hence it is binding upon all parties. The defendants are entitled to the information sought in these interrogatories because it is reasonably calculated to lead to admissible evidence that the derailment was caused by NECR's gross negligence or willful misconduct.

5. NECR's response to the defendants' Interrogatory #13 seemed to indicate that responsive information exists but is claimed by NECR to be privileged (Exh. A hereto). The privilege log that subsequently was provided to the defendants does not appear to address this issue, either (Exh. B hereto). Indeed, the privilege log doesn't address interrogatories at all but is limited to documents.

6. Magistrate Judge Neiman's order of October 24, 2006 required NECR to provide its privilege log no later than November 1. On the afternoon of the due date, Mr. Davidson e-mailed me asking for two additional days to provide the log (Exh. C hereto). I acceded to Mr. Davidson's request but asked the whereabouts of the additional documents and interrogatory answers that had been the subject of our discussion and my letter back in mid-October (Exh. C hereto).

7. I finally received NECR's privilege log on November 6 but received no additional documents or interrogatory responses. On November 8, I e-mailed Mr. Davidson asking for a telephone conference on the missing materials. Mr. Davidson was unable to confer until the following Monday—November 13.

8. On November 13, 2006, Mr. Davidson and I again discussed the missing items. He indicated at that time that he expected to be able to make them available by that Friday, November 17. We also discussed the status of discovery and the schedule of the case, and decided to file a joint motion seeking a three-month extension of the date (February 2, 2007) the Court had set for the pretrial conference and related filings. The motion was filed that afternoon [Docket No. 47] but was denied the following day.

9. Mr. Davidson and I were unable to coordinate a telephone conference until two days later (November 16). At that time Mr. Davidson reiterated his expectation of delivering the missing items by the 17th. No materials were delivered on November 17 (a Friday), or the following Monday (November 20), or thus far today (November 21). I telephoned Mr. Davidson on the morning of November 20, was told that he was in the office but on another call, and left a message indicating that this motion soon would be filed if the materials were not forthcoming. I have received no response to that message.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on November 21, 2006.

A handwritten signature in black ink, appearing to read "Eric L. Hirschhorn", written over a horizontal line.

Eric L. Hirschhorn

Exhibit A

WINSTON & STRAWN LLP

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CHICAGO, ILLINOIS 60601-9703

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101 CALIFORNIA STREET
SAN FRANCISCO, CALIFORNIA 94111-5894

October 17, 2006

VIA ELECTRONIC AND FIRST CLASS MAIL

Richard A. Davidson, Jr., Esquire
Flynn & Associates, P.C.
400 Crown Colony Drive, Suite 200
Quincy, Massachusetts 02169

**Re: New England Central Railroad, Inc. v. Springfield Terminal Railway
Company et al.**

Dear Rich:

As discussed over the phone yesterday morning, this is to outline the discovery issues that currently are outstanding in the above-captioned action.

Our discovery responses. I am sending ST and B&M's responses to NECR's document requests and interrogatories this evening by overnight courier.

NECR's document production. The sole document that NECR produced in response to our June 30, 2006 request is the General Code of Operating Rules (4th ed. Apr. 2, 2000) that is used by NECR and a number of other railroads. At a minimum, we had expected NECR's production to include the following items:

- Weekly and semiweekly track inspection reports covering the Line, from January 1, 2002 to the present time. These are different from the monthly track reports that were produced as part of NECR's initial disclosures under Rule 26(a)(1).
- All documents relating to the derailment that is the subject of the action, including all versions (draft and final) of any reports furnished to the Federal Railroad Administration in respect of the derailment, internal memoranda (handwritten and otherwise), and the like.

WINSTON & STRAWN LLP

Richard A. Davidson, Jr., Esquire

October 17, 2006

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- All documents relating to or addressing the Federal Railroad Administration track inspection conducted on the Line in June 2005, including any plans for responding to or addressing the results of that inspection.
- All documents relating to actual or possible disciplinary action affecting individuals responsible for the condition of the track on the Line between January 1, 2002 and the present time.
- All recordings (including written transcripts and summaries thereof) of conversations between the ST/B&M crew of the train that derailed and the individuals responsible for dispatching the Line on behalf of NECR.
- The agreements between NECR and Amtrak.
- All correspondence between NECR (or its agents) and Amtrak since January 1, 2002 regarding track conditions and slow orders on the Line, as well as incentive payments.
- All correspondence between NECR and its agents, on the one hand, and the contractors who performed repair work on the Line due to the derailment, on the other, relating to such repair work. We received considerable documentation of invoices and similar formal commercial items relating to this work as part of NECR's initial disclosure but not the interchanges about the actual work to be performed.

NECR's responses to our interrogatories. NECR's responses to our Interrogatories # 10 and #15 contain various objections but no substantive information. To the extent that NECR's objections are based upon the text of Section 7.1 of the Interstate Commerce Commission's 1990 trackage rights order, I note that the Surface Transportation Board's reconsideration decision, served January 10, 2006, interpreted that provision to be inapplicable if there has been gross negligence or willful misconduct on the part of NECR. No review of the STB ruling was sought, *see* 28 U.S.C. § 1336, and hence it is binding upon all parties. ST and B&M are entitled to the information sought in our interrogatories because it is reasonably calculated to lead to admissible evidence that the derailment was caused by NECR's gross negligence or willful misconduct.

NECR's response to our Interrogatory #13 seems to indicate that responsive information exists but is claimed by NECR to be privileged. ST and B&M are entitled to receive either the information or a claim of privilege set out in the manner envisaged by Rule 26(b)(5) of the Federal Rules and (as to documents) Rule 34.1(e) of the Local Rules of this Court.

WINSTON & STRAWN LLP

Richard A. Davidson, Jr., Esquire
October 17, 2006
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Claims of privilege. You indicated that NECR shortly will produce a privilege log governing information withheld from NECR's responses to our June 30, 2006 document requests and interrogatories. It is essential that we receive this log promptly so that we can bring disputes before the Court for resolution before we take depositions of NECR employees.

Non-expert depositions. We expect to take approximately eight to ten non-expert depositions of current NECR employees. These probably will include the six individuals named in NECR's answer to our Interrogatory #11 and Mr. Richard R. Boucher. We didn't agree on a location for these depositions but you asked us to consider taking them in St. Albans or Burlington, Vermont. You intend to take depositions of ST and B&M employees at your office in Quincy, Massachusetts. You and I agreed to consult further to determine times, locations, and the individuals to be deposed.

Expert witnesses. We agreed to delay temporarily the identification of expert witnesses and the production of their reports. (Your report is due today and ours on November 15, 2006.) We also agreed that the delay should be brief because the holiday season soon will be upon us, the Court has scheduled the Rule 26 conference for February 2, 2007, and the parties' pretrial memoranda are due January 26, 2007.

I believe this includes everything we covered. Please let me know if I have omitted or misstated anything, or if there are other issues that we need to discuss.

Sincerely,



Eric L. Hirschhorn

WINSTON & STRAWN LLP

Richard A. Davidson, Jr., Esquire

October 17, 2006

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bc: Robert B. Culliford, Esq. (w/o encls.)
Clinton P. Wright, Esq. (w/o encls.)

Exhibit B

Hirschhorn, Eric

From: Richard Davidson [radavidsonjr@flynnassoc.com]
Sent: Monday, November 06, 2006 3:00 PM
To: Hirschhorn, Eric
Cc: Michael Flynn
Subject: NECR v. BM/STRC

Eric:

Attached please find the Privilege Log concerning the documents withheld in the above-captioned matter.

Thank you for your attention to this matter.

Sincerely,

Richard A. Davidson, Jr.
FLYNN & ASSOCIATES, P.C.
400 Crown Colony Drive, Suite 200
Quincy, MA 02169
Tel. No.: (617) 773-5500
Fax No.: (617) 773-5510

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11/6/2006

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

NEW ENGLAND CENTRAL RAILROAD, INC.,
Plaintiff,

v.

SPRINGFIELD TERMINAL RAILWAY
COMPANY and BOSTON AND MAINE
CORPORATION,

Defendants

Civil Action No.: 04-30235-MAP

**PLAINTIFF'S PRIVILEGED LOG FOR DOCUMENTS WITHHELD FROM
DISCOVERY BASED UPON ATTORNEY-CLIENT PRIVILEGE AND/OR
WORK PRODUCT DOCTRINE**

The plaintiff, New England Central Railroad, Inc., has withheld from the documents and records produced in the discovery of this case, based upon either the attorney-client privilege or pursuant to the work product doctrine, the following documents and/or records:

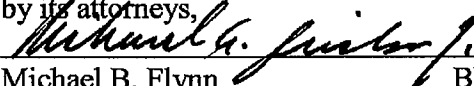
DATE	AUTHOR	RECIPIENT	SUBJECT
7/6/04	Robby Devin	Charles Moore, et al.	Guilford's responsibility to pay damages
7/6/04	Charles Moore	Robby Devin, et al.	Guilford's responsibility to pay damages
7/6/04	Robby Devin	Charles Moore, et al.	Guilford's responsibility to pay damages
7/6/04	Charles Moore	Sandy Franger, et al.	Guilford's responsibility to pay damages
7/7/04	Tammy Campbell	Charles Moore, et al.	Calculating daily car hire charges
7/7/04	Vicky Lagrow	Tammy Campbell, et al.	Car hire calculations
8/20/04	Gary Laakso	Charles Moore	Selection of derailment counsel and issues to be addressed
9/3/04	Jeni Ladue	Charles Moore, et al.	Invoicing the B&M for the derailment
8/24/04	Charles Moore	Gary Laakso, et al.	Positions concerning inquiries from in-house counsel
8/20/04	Gary Laakso	Charles Moore	Inquiries from in-house counsel
8/24/04	Robby Devin	Gary Laakso	Contacting ST's insurance carrier
8/24/04	Gary Laakso	Robby Devin	Contacting ST's insurance carrier
8/21/04	Charles Moore	Gary Laakso	Selection of derailment counsel and issues to be addressed
8/20/04	Gary Laakso	Charles Moore	Selection of derailment counsel and issues to be addressed

8/16/04	Steve Scott	Michael Lawyer	Responsibility for clean-up and capital work
8/11/04	Jeni Ladue	Michael Lawyer, et al.	AMTRAK incentive calculations
7/19/04	Tammy Campbell	Jeni Ladue	Derailment delay calculations and interpretations
8/1/04	Charles Moore	Tammy Campbell, et al.	AMTRAK monies due - derailment
7/30/04	Tammy Campbell	Steve Scott, et al.	Delay amounts due and conductor's delay reports
7/30/04	Steve Scott	Thomas Murphy, et al.	Delay amounts due and conductor's delay reports
7/30/04	Thomas Murphy	Jeni Ladue	Delay amounts due and conductor's delay reports
7/29/04	Jeni Ladue	Thomas Murphy	Delay amounts due and conductor's delay reports
7/26/04	Jeni Ladue	Thomas Murphy	Delay amounts due and conductor's delay reports
7/10/04	Charles Moore	Michael Lawyer	Cars solely in account of the ST and case strategy
7/6/04	Gary Laasko	Charles Moore, et al.	Cars solely in account of the ST and case strategy
7/6/04	Charles Moore	Robby Devin, et al.	ST's exposure and case strategy
7/6/04	Robby Devin	Charles Moore, et al.	ST's exposure and case strategy
7/9/04	Mark Chin	Michael Lawyer, et al.	Case strategy and damages containment
7/9/04	Michael Lawyer	Mark Chin	Case strategy and damages containment
7/9/04	Mark Chin	Michael Lawyer, et al.	Case strategy and damages containment
7/9/04	Michael Lawyer	Mark Chin, et al.	Case strategy and damages containment
7/9/04	Mark Chin	Charles Moore, et al.	Case strategy and damages containment
7/9/04	Charles Moore	Mark Chin, et al.	Case strategy and damages containment
7/9/04	Mark Chin	Delores Rangel, et al.	Case strategy and damages containment
7/9/04	Delores Rangel	Charles Moore	Case strategy and damages containment
7/9/04	Charles Moore	Dolores Rangel	Case strategy and damages containment
7/9/04	Charles Moore	Jeff Bloom	Case strategy and damages containment
7/9/04	Charles Moore	Scott Linn	Case strategy and damages containment
7/9/04	Charles Moore	Mark Chin, et al.	Case strategy and damages containment
7/9/04	Charles Moore	Mark Chin, et al.	Case strategy and damages containment
7/6/04	Charles Moore	Robby Devin, et al.	Authority for contractor billing and contact with Sid Culliford for billing
7/6/04	Robby Devin	Charles Moore, et al.	Responsibility for damages
7/6/04	Charles Moore	Robby Devin, et al.	Investigation of the cause of the derailment
7/6/04	Robby Devin	Charles Moore, et al.	NECR's legal rights and Trackage Rights Agreement interpretation
7/6/04	Charles Moore	Sandy Franger, et al.	NECR's legal rights and Trackage Rights Agreement interpretation
7/6/04	Terry Campbell	Charles Moore, et al.	NECR's legal rights and Trackage Rights Agreement interpretation
7/6/04	Charles Moore	Tammy Campbell, et al.	NECR's legal rights and Trackage Rights Agreement interpretation
7/8/04	Charles Moore	Gary Laakso	Damages and damage to the NECR property
7/8/04	Gary Laakso	Charles Moore	Damages and damage to the NECR property
7/6/04	Charles Moore	Steve Scott	Capturing damage related expenses
	Charles Moore	Daniel Hershman	NECR's legal rights, Trackage Rights Agreement interpretation, and damage calculations
	Charles Moore	Jeni Ladue, et al.	NECR's legal rights, Trackage Rights Agreement interpretation, and damage

			calculations
9/3/04	Jeni Ladue	Charles Moore, et al.	NECR's legal rights, Trackage Rights Agreement interpretation, and damage calculations
7/9/04	Gary Laakso	Charles Moore, et al.	Damage to ties, 49 CFR 213.109(e) and damages
7/8/04	Charles Moore	Gary Laakso	NECR's legal rights, Trackage Rights Agreement interpretation, and damage calculations
7/8/04	Gary Laakso	Charles Moore	Damages considerations and tie value
7/8/04	Gary Laakso	Charles Moore	NECR's legal rights and Trackage Rights Agreement interpretation
7/8/04	Charles Moore	Gary Laakso	NECR's legal rights and Trackage Rights Agreement interpretation
7/8/04	Charlie Moore	Larry Ferguson	Analysis of the derailment
	Charles Moore	Gary Laakso	Enforcement of the Trackage Rights Agreement
8/20/04	Gary Laakso	Charles Moore	Enforcement of the Trackage Rights Agreement
8/25/04	Charles Moore	Gary Laakso	Enforcement of the Trackage Rights Agreement
8/20/04	Gary Laakso	Charles Moore	Enforcement of the Trackage Rights Agreement
8/25/04	Gary Laakso	Charles Moore	Enforcement of the Trackage Rights Agreement
	Charles Moore	Jeff Bloom	Enforcement of the Trackage Rights Agreement and damages
7/8/04	Charles Moore	Scott Linn	Enforcement of the Trackage Rights Agreement and damages
2/16/04	Gary Laakso	Charles Moore	Litigation strategy and information
2/16/04	Michael Flynn	Gary Laakso, et al.	Litigation strategy and information
10/19/04	Gary Laakso	Charles Moore	Damages and enforcement of the terms of payment under the Trackage Rights Agreement, as well as possible remedies
10/19/04	Charles Moore	Gary Laakso	Damages and enforcement of the terms of payment under the Trackage Rights Agreement
9/28/04	Charles Moore	Gary Laakso	Damages and enforcement of the terms of payment under the Trackage Rights Agreement
8/20/04	Gary Laakso	Charles Moore	Damages and enforcement of the terms of payment under the Trackage Rights Agreement
8/21/04	Charles Moore	Gary Laakso	Damages and enforcement of the terms of payment under the Trackage Rights Agreement
8/20/04	Gary Laakso	Charles Moore	Damages and enforcement of the terms of payment under the Trackage Rights Agreement
8/5/04	Charles Moore	Gary Laakso	Damages and enforcement of the terms of payment under the Trackage Rights Agreement
8/5/04	Gary Laakso	Charles Moore	Damages and enforcement of the terms of payment under the Trackage Rights

			Agreement
8/5/04	Charles Moore	Gary Laakso	Damages and enforcement of the terms of payment under the Trackage Rights Agreement
8/21/04	Charles Moore	Gary Laakso	Damages and enforcement of the terms of payment under the Trackage Rights Agreement
8/17/04	Gary Laakso	Scott Linn, et al.	Damages and enforcement of the terms of payment under the Trackage Rights Agreement
8/17/04	Scott Linn	Gary Laakso, et al.	Damages and enforcement of the terms of payment under the Trackage Rights Agreement
8/23/04	Charles Moore	Jeni Ladue	Damages and enforcement of the terms of payment under the Trackage Rights Agreement
8/23/04	Jeni Ladue	Charles Moore	Damages and enforcement of the terms of payment under the Trackage Rights Agreement
8/23/04	Charles Moore	Jeni Ladue	Damages and enforcement of the terms of payment under the Trackage Rights Agreement
8/21/06	Charles Moore	Jeni Ladue	Damages and enforcement of the terms of payment under the Trackage Rights Agreement
8/17/04	Gary Laakso	Scott Linn, et al.	Damages and enforcement of the terms of payment under the Trackage Rights Agreement
7/8/04	Gary Laakso	Charles Moore	Enforcement of the terms of payment under the Trackage Rights Agreement
7/8/04	Charles Moore	Gary Laakso	Enforcement of the terms of payment under the Trackage Rights Agreement
7/6/04	Charles Moore	Robby Devin, et al.	Trackage Rights Agreement interpretation
	Charles Moore		Suggested narrative for ST derailment with draft report and notes
	Charles Moore	Steve Scott	Cost and damage management and expense capture
9/16/04	Gary Laakso	Charles Moore, et al.	Damages – direct vs. consequential damages
7/8/04	Gary Laakso	Charles Moore	Trackage Rights Agreement and interpretation
7/7/04	Charles Moore	Gary Laakso	Trackage Rights Agreement and interpretation
7/7/04	Gary Laakso	Charles Moore	Trackage Rights Agreement and interpretation

Respectfully submitted,
 NEW ENGLAND CENTRAL RAILROAD, INC.,
 by its attorneys,


 Michael B. Flynn BBO# 559023
 Richard A. Davidson, Jr. BBO# 552988
 FLYNN & ASSOCIATES, P.C.
 400 Crown Colony Drive, Suite 200
 Quincy, MA 02169
 (617) 773-5500

Dated: November 6, 2006

Exhibit C

Hirschhorn, Eric

From: Hirschhorn, Eric
Sent: Wednesday, November 01, 2006 2:42 PM
To: 'Richard Davidson'
Subject: RE: NECR v. BM/STRC

Rich--

OK, but what about the documents and interrogatory answers addressed in my letter to you of October 17? I need those as well.

We also need to set deposition dates and reset the dates for our respective expert reports, lest we become mired in trying to complete these activities in the middle of the holidays.

**Rgds,
Eric.**

-----Original Message-----

From: Richard Davidson [mailto:radavidsonjr@flynnassoc.com]
Sent: Wednesday, November 01, 2006 2:32 PM
To: Hirschhorn, Eric
Subject: NECR v. BM/STRC

Eric:

I have the log 95% complete, but have been in depositions today and scheduled for tomorrow. Is it okay if I get the log to you by Noon on Friday?

Sincerely,

Richard A. Davidson, Jr.
FLYNN & ASSOCIATES, P.C.
400 Crown Colony Drive, Suite 200
Quincy, MA 02169
Tel. No.: (617) 773-5500
Fax No.: (617) 773-5510

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11/20/2006